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No. 87-28

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE W. PICKETT, ET AL., PETITIONERS

v.

EDWARD JOSEPH X. CHAPMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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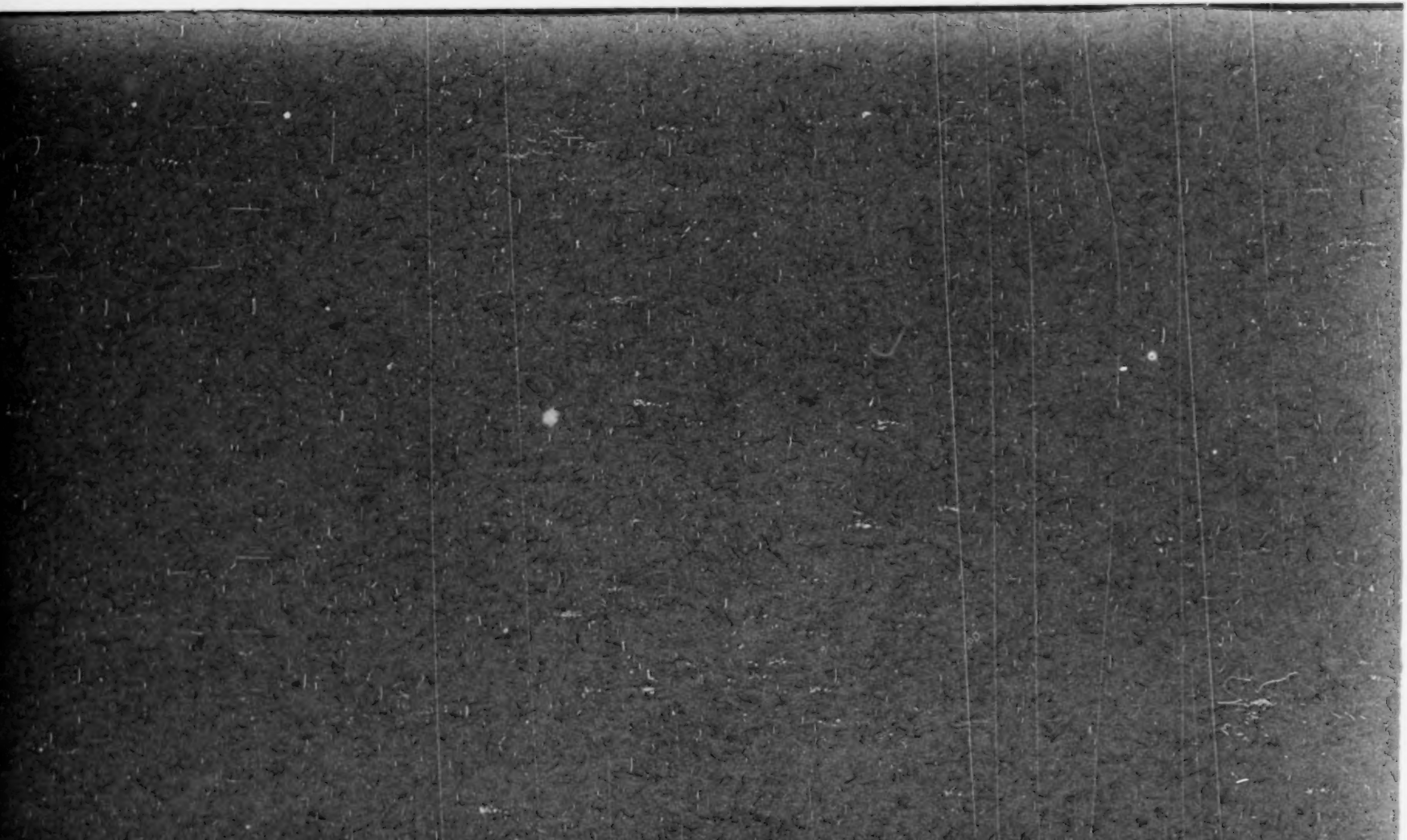

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1. Respondent argues (Br. in Opp. 4-5) that petitioners did not properly raise their immunity claim in the courts below. In fact, however, this claim was raised and was given extensive consideration by both the district court and the court of appeals. It is therefore properly presented in this Court.

Petitioners raised the immunity issue when this case was tried before the district court. In its conclusions of law entered following the 1976 trial, the district court specifically rejected petitioners' immunity claim. The court stated that petitioners "knew or should have known that their confinement of [respondent] to segregation for a period of over nine months * * * was a violation of his clearly-established right to be free of cruel and unusual (disproportionate) punishment. Under those circumstances, such a confinement cannot reasonably be characterized as being in good faith" (Pet. App. 123a-124a). The court of appeals expressly upheld that determination (*id.* at 59a), remanding the case for calculation of damages on the Eighth Amendment claim (*id.* at

57a-58a). Petitioners again pressed the immunity issue before the court of appeals on the most recent appeal, contending that the issue should be reconsidered in light of this Court's intervening decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The court of appeals considered and rejected petitioners' claim (Pet. App. 10a-11a n.4). The immunity issue was thus raised in the courts below and decided by those courts. That is sufficient to preserve the issue for consideration by this Court.

Respondent first contends (Br. in Opp. 4) that petitioners' immunity claim was not properly preserved because petitioners did not frame their 1976 immunity argument in the precise manner in which the argument is presented in the certiorari petition. But, as respondent himself observes, "[p]etitioners' argument in this Court is that the court below misapplied the *Harlow* v. *Fitzgerald* standard. The argument that *Harlow* has been misapplied could only have been raised after the *Harlow* decision" (Br. in Opp. 5 n.2). Petitioners cannot be faulted because they failed to articulate an argument in 1976 in a manner that even respondent acknowledges could not have been presented until 1982.[1]

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[1] Respondent may be contending that petitioners should have raised their *Harlow* argument before the district court on the final remand in 1984. As a threshold matter, a claim once raised in and decided by both the district court and court of appeals need not be reasserted repeatedly in subsequent remand proceedings in those courts in order to preserve the claim for review in this Court. After all, the constraints of the law-of-the-case doctrine limit the authority of those courts to revisit claims previously resolved. These constraints, however, do not affect this Court's discretion to review the lower courts' initial determinations. See, *e.g.*, *Falk* v. *Brennan*, 414 U.S. 190, 194 n.7 (1973).

Moreover, the particular circumstances of this case make clear that petitioners acted reasonably in waiting to urge the argument based on *Harlow* until the most recent proceeding before the court of appeals. Following the court of appeals' 1978 remand for the calculation of damages on the Eighth Amendment claim and for other purposes, the

Respondent also asserts (Br. in Opp. 5) that he was prejudiced because if he had been aware of the precise nature of petitioners' immunity claim in 1976, he would have adduced evidence at trial regarding prison officials' understanding of the limitations on their authority imposed by the Eighth Amendment. But it is not at all clear that such testimony would have been of assistance in assessing petitioners' entitlement to immunity: the *Harlow* test turns upon objective reasonableness, and courts typically examine the relevant precedents and decide for themselves whether a government official could reasonably believe that his conduct complied with the Constitution. See, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 530-535 (1985).[2] In any event, to the extent that such

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district court twice entered judgment for petitioners, once relying upon an intervening decision of this Court. The court of appeals each time vacated the district court's judgment and remanded for the calculation of damages on the Eighth Amendment claim. See Pet. 6-7 & nn.4-5. In its final remand order, issued in January 1982, the court of appeals stated that "[a]n appellate decision establishes the law of the case for all subsequent stages of the litigation. Thus, the trial court is restrained with respect to those issues that have been considered and resolved by the appellate court" (Pet. App. 38a). The court of appeals directed the district court to ascertain "when the [Eighth Amendment] violation began, and what the damage award should be" (*id.* at 39a). In light of the extremely limited scope of the remand, it is not surprising that when *Harlow* was decided only five months later, petitioners did not seek to relitigate the immunity issue before the district court. Indeed, although the court of appeals noted that petitioners had not reasserted the issue in the district court during the remand proceedings, it did not find that the issue had been waived, and it went on to address petitioners' immunity argument on the merits.

[2] Respondent observes (Br. in Opp. 4) that this Court held in *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987), that *Harlow* may in some circumstances require a fact-specific inquiry. But that inquiry is directed toward ascertaining the facts relating to the conduct challenged in the lawsuit. The Court did not indicate that the immunity inquiry turns upon expert testimony regarding the state of the law at the time of that conduct.

evidence might be relevant, respondent will be free to seek an evidentiary hearing on remand.

2. Respondent also asserts (Br. in Opp. 6-7) that certiorari should be denied because "resolution of the question presented by the petition turns only on the facts of this case and is of interest only to these parties." Respondent apparently believes that a rule of law announced by this Court should be applied to cases pending on certiorari only when the pending case itself is independently worthy of plenary review.

That contention is squarely inconsistent with this Court's settled practice of granting the certiorari petition in such a case, vacating the lower court's decision, and remanding the case for further proceedings. Respondent has not presented any substantive reason why the rule announced in *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987), should not be applied in this case.

Petitioners are government employees who face monetary liability, in their personal capacities, for their official acts in administering the Marion penitentiary. Simple fairness dictates that petitioners' immunity claim be evaluated under the proper standard before petitioners are required to assume personally any such monetary liability.[3]

For the foregoing reasons, and for the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of

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[3] Respondent argues (Br. in Opp. 7, 8-9) that the courts below have correctly resolved the immunity issue. If that is so, respondent has nothing to fear from a remand. As we discussed in the petition (at 10-11 & nn.6-7), however, the court of appeals did not cite any decision that would have made petitioners aware that the *duration* of an inmate's assignment to segregation was a matter governed by the Eighth Amendment. Judge Easterbrook correctly concluded in dissent that "[t]he answer to the question 'was it clearly established in 1973 that the eighth amendment forbids "excessive" administrative punishments' is No" (Pet. App. 27a).

the court of appeals vacated, and the case remanded for further consideration in light of this Court's decision in *Anderson* v. *Creighton, supra.*

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